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No. 06-1540

IN THE
# Supreme Court of the United States

MALLINCKRODT INC.

*Petitioner,*

V.

MAINE PEOPLE'S ALLIANCE AND NATURAL RESOURCES DEFENSE COUNCIL, INC.

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a court may find injury-in-fact, consistent with this Court's Article III jurisprudence, where plaintiffs reasonably curtailed their use of natural resources based on reliable information about serious mercury contamination, and in view of persuasive evidence from experts and government officials that the mercury may present an imminent and substantial endangerment to human health and the environment.

2. Whether this Court should uphold a finding of liability under the citizen suit provision of the Resource Conservation and Recovery Act, based on the same legal standard applied by every court of appeals to consider it, where plaintiffs demonstrated that a polluter's wastes "may present an imminent and substantial endangerment to health or the environment," and the district court properly exercised its discretion to adjudge a risk of serious harm and devise a suitable remedy.

## RULE 29.6 LISTING

Pursuant to Rule 29.6 of the Rules of this Court, respondents Maine People's Alliance and Natural Resources Defense Council, Inc. state that they are non-profit corporations with no outstanding shares or debt securities in the hands of the public, and that neither organization has any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

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## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Maine People's Alliance and Natural Resources Defense Council, Inc. respectfully request that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

## STATEMENT OF THE CASE

The First Circuit has joined its sister courts of appeals in adopting their uniform view of federal courts' equitable authority under the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B). The First Circuit's opinion faithfully reflects Congress's deliberate choices about how best to protect human health and the environment from significant risks associated with persistent toxic contamination from industrial activities.

In this case, petitioner released massive quantities of mercury, a highly toxic chemical, directly into the Penobscot River from a chemical manufacturing facility in Maine. Although the Environmental Protection Agency ("EPA") and its state counterpart knew for decades that mercury from the plant had contaminated the river for many miles downstream of the plant, the agencies never compelled petitioner to address that contamination.

Recognizing that, as in this case, agencies sometimes fail adequately to address public health and environmental risks from toxic wastes, Congress has granted federal courts broad powers under RCRA to eliminate such risks at the behest of affected citizens. Respondents brought suit under RCRA section 7002(a)(1)(B), a provision modeled on nuisance principles that permits a court to respond as needed when wastes "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C.

§ 6972(a)(1)(B). Congress has made clear that this provision is "'intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes.'" S. Rep. No. 98-284, at 59 (1983) (quoting *United States v. Price*, 688 F.2d 204, 214 (3d Cir. 1982)).

Based on an extensive factual record and applying well-established legal standards, the district court below found that plaintiffs had standing because their members reasonably refrained from using contaminated Penobscot resources. Finding further that mercury, predominantly from petitioner's facility, was spreading throughout the Penobscot system, converting into its most toxic form, and working its way up the food web, the court found petitioner liable under the applicable legal standard: its waste *may* present an imminent and substantial endangerment to human health and the environment. At plaintiffs' request, the district court ordered a study to determine the full scope and character of the contamination, a prerequisite to any further remedy that might follow.

Petitioner appealed, claiming that district courts are not empowered to make their own determinations of harm, either for purposes of Article III standing or for adjudging RCRA liability; such determinations, it claims, are reserved to agencies. The First Circuit found no support for this all-out attack on judicial power, which it found to be in direct conflict with Congress's express allocation of authority under RCRA. Moreover, the First Circuit rejected petitioner's attempts to cramp courts' discretion through reference to an invented statutory hierarchy of risks and remedies. Instead, the court adopted the view, shared by the six other courts of appeals to opine on the scope of "imminent and substantial endangerment" authority, that the language and purpose of the statute confer expansive equitable powers, and that the district court's rulings, based on well-grounded factual findings, were consistent with those powers.

Petitioner tries to paint a dramatic portrait of unconstrained citizens and courts threatening to debilitate the nation's economy and undermine government agencies. In the end, however, this is just a case about a polluter who, for decades, escaped accountability for dangerously contaminating an estuary and who now seeks one final reprieve. The courts below, thoughtfully applying well-settled legal principles, have ruled that petitioner must take responsibility for its pollution. There is no cause for this Court to disturb those rulings.

## REASONS FOR DENYING THE PETITION

### I. COURTS ARE EMPOWERED UNDER RCRA TO MAKE INDEPENDENT JUDGMENTS BASED ON THE EVIDENCE IN FINDING INJURY-IN-FACT SUFFICIENT TO CONFER STANDING UNDER ARTICLE III.

Petitioner advances the radical argument that district courts are powerless to find injury-in-fact except as defined by a "politically accountable entity." Pet. 10, 11. The First Circuit characterized this argument as "nothing less than a no-holds-barred assault on the federal courts' institutional competency" that has "breathtaking ramifications for the scope of judicial power." Pet. App. 12a, 13a. Petitioner's theory defies logic and is without support from the decisions of this (or any other) Court. Congress, acting within its constitutional authority, created a cause of action under RCRA that does not depend on violation of agency-defined standards. And courts are competent (indeed, obliged) to assess whether plaintiffs have suffered a cognizable injury under Article III, based on the standards set forth in the statute.

### A. The Courts Below Properly Assessed Well-Grounded Factual Findings Under The Settled Legal Standard In Holding That Plaintiffs Demonstrated Injury-In-Fact.

Article III standing requires an individual plaintiff to demonstrate a concrete and particularized injury-in-fact, a causal connection between the defendant's actions and that injury, and a likelihood that prevailing in the lawsuit will provide some redress for the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). At issue here is the injury-in-fact finding below.

The district court heard and credited testimony from four of plaintiffs' members who live on or near the Penobscot River and stated that they forgo activities out of fear of mercury contamination. Pet. App. 9a-10a. As described by the First Circuit, "[a]lthough eager to do so, none of them will eat fish or shellfish from the river nor recreate on or near it. One witness added that, but for the mercury contamination, she would harvest mussels and sell them to supplement her income." *Id.* at 10a. Under this Court's rulings, the evidence considered by the court easily supports its finding of injury.

The First Circuit acknowledged that "[t]o establish an injury in fact based on a probabilistic harm, a plaintiff must show that there is a substantial probability that harm will occur." Pet. App. 11a (citing *Warth v. Seldin*, 422 U.S. 490, 504 (1975)). In this context, the First Circuit found that the district court, drawing on a "plethora" of evidence,

> supportably concluded that "mercury is methylating downriver, and that such methylmercury is bioavailable, entering biota, and biomagnifying throughout the food web" in sufficient quantity that it may well present an imminent and substantial danger to the environment. Relatedly, the [district] court found that "the effects resulting from

> methylmercury exposure . . . clearly endanger reproduction, development, and overall health of the public and the environment," and that [petitioner] "has been a dominant source of mercury in the Penobscot River."

Pet. App. 11a-12a (citations omitted).[1]

In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), this Court confirmed that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id.* at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (citing *Defenders of Wildlife*, 504 U.S. at 562-63)). As the First Circuit correctly noted, a plaintiff's decision to forgo aesthetic or recreational pleasures based on concerns about pollution will constitute a cognizable injury when that concern is based on a realistic threat. Pet. App. 10a (citing *Laidlaw*, 528 U.S. at 184; *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983)). The plaintiffs in *Laidlaw* attested that they refrained from recreating along the river into which the defendant discharged its effluent, because of their concerns about the unlawful pollution. 528 U.S. at

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[1] Petitioner repeatedly quotes a statement from plaintiffs' expert, Dr. Robert Livingston, to challenge the district court's finding of harm. Pet. 6, 15. The First Circuit dismissed this ploy of relying "on a single snippet of Dr. Livingston's testimony, wrested from its contextual moorings," declaring that "a trial court, confronted with a complex and highly ramified factual situation, is fully entitled to consider the import of a witness's testimony as a whole. This case is a good example." Pet. App. 11a. In fact, Dr. Livingston testified in detail about "problems" associated with mercury from petitioner's plant, *see* Tr. Vol. 1A, at 1-49, Tr. Vol. 1B, at 1-81, Tr. Vol. 1C, at 1-36, Tr. Vol. 9, at 3-90, concluding that there was presently a "serious" endangerment from mercury downriver, Tr. Vol. 9, at 3-4. In holding that there may be an imminent and substantial endangerment from petitioner's mercury, the court found Dr. Livingston's testimony to be "particularly credible and persuasive." Pet. App. 61a.

181-83. This Court found the plaintiffs' concerns reasonable, given the defendant's "continuous and pervasive illegal discharges of pollutants." *Id.* at 184.

The First Circuit below endorsed the district court's findings of injury-in-fact under the *Laidlaw* standard:

> In light of its warrantable findings, the court had ample reason to conclude that [petitioner] has created a substantial probability of increased harm to the environment. That increased risk, in turn, rendered reasonable the actions of the plaintiffs' members in abstaining from their desired enjoyment of the Penobscot.

Pet. App. 12a. The courts below applied the settled legal standard and properly found that the evidence supported a finding of Article III injury under that standard.

### B. District Courts Have Authority To Assess Risks In Imminent And Substantial Endangerment Cases.

The core of petitioner's argument is that the reasonableness of an environmental plaintiff's concerns can be assessed *only* by reference to violation of agency standards. *Laidlaw* itself implies no such proposition.[2] Where a lawsuit is based on violation of an agency-defined standard, like the Clean Water Act permit at issue in *Laidlaw*, it makes sense that a court may determine injury with reference to that standard. But where, as here, Congress has created a cause of action based on a risk that is not defined in relation to agency standards, courts may determine injury as the district court did below – through conventional fact-finding based on a range of evidence. Contrary to petitioner's

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[2] *See Cent. Delta Water Agency v. United States*, 306 F.3d 938, 949 (9th Cir. 2002) (discussing why "[t]he reasoning in [*Laidlaw* and other] cases does not require that a statutory violation have occurred in order for standing to exist to challenge threatened environmental harm").

claims, this traditional equitable authority does not implicate separation of powers concerns.

### 1. Under RCRA's "Imminent And Substantial Endangerment" Provision, Congress Created A Claim Independent Of Agency Standards.

Congress purposefully created a cause of action that is independent of RCRA's general regulatory scheme. By contrast, nearly every other federal environmental statute authorizes affected citizens to sue only for violation of regulatory requirements, including permits, standards, orders, or other limitations defined by agencies. *See, e.g.*, Clean Water Act § 505(a), 33 U.S.C. § 1365(a); Clean Air Act § 304(a), 42 U.S.C. § 7604(a). RCRA itself contains such a provision – § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A) – authorizing suit for "violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter."

Alone among environmental statutes that provide for an agency-implemented regulatory scheme, RCRA defines an additional cause of action for citizens that is *independent* of agency-imposed requirements. This second provision – § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B) – authorizes suit against those whose waste "may present an imminent and substantial endangerment to health or the environment," notwithstanding compliance or non-compliance with regulatory requirements.[3]

Congress understood that endangerment may not be so simply measured as compliance with an agency-defined standard; a finding of endangerment requires a court's discretion to weigh all kinds of evidence. In fact, Congress declared that the imminent and substantial endangerment

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[3] Originally, Congress gave the power to address imminent and substantial endangerment only to EPA. RCRA § 7003, 42 U.S.C. § 6973. Congress later extended the authority to citizen claims upon finding that EPA enforcement was incomplete, *see infra* Part II-A.

provision "is essentially a codification of common law public nuisance remedies . . . [and], therefore, incorporates the legal theories used for centuries to assess liability for creating a public nuisance . . . and to determine appropriate remedies . . . ." S. Rep. No. 96-172, at 5 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 5019.[4] *See also Cox v. City of Dallas*, 256 F.3d 281, 289 (5th Cir. 2001) ("Nuisance principles form the core doctrinal foundation for modern environmental statutes, including the RCRA."). In codifying the provision, Congress exhorted courts to recognize "that risk may be 'assessed from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections, from imperfect data, or from probative preliminary data not yet certifiable as "fact."'" S. Rep. No. 98-284, at 59 (1983) (citations omitted). Congress made clear that the new provision was "'intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risks posed by toxic wastes.'" *Id.* at 59 (1983) (quoting *United States v. Price*, 688 F.2d 204, 214 (3d Cir. 1982)).

As found by the court below, "Congress has elected to create a cause of action for affected citizens notwithstanding the absence of any EPA-sponsored standard." Pet. App. 13a. This in no way implicates Article III concerns. This Court's recent decision in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), reaffirms that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.* at 1453 (quoting *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J.,

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[4] Although Congress made this pronouncement with respect to section 7003, 42 U.S.C. § 6973, it applies equally to the analogous citizen suit provision, which "[is] intended to allow citizens exactly the same broad substantive and procedural claim for relief which is already available to the United States under section 7003." S. Rep. No. 98-284, at 56-57 (1983). *See also Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1314-15 (2d Cir. 1993).

concurring in part and concurring in judgment)). In considering such a claim, a court, like the district court below, may weigh various types of evidence in assessing whether plaintiffs have demonstrated the requisite Article III injury.

### 2. Courts' Determinations Of Article III Injury Under RCRA Do Not Encroach on Agency Powers.

Petitioner challenges the district court's authority to assess harm in this traditional manner. In arguing that only politically accountable bodies may determine what constitutes environmental harm, petitioner conflates the general policy-making activities that normally fall within the province of agencies with the case-specific adjudicatory powers granted to federal district courts.

Petitioner first claims that only politically accountable bodies, not courts, may determine what environmental risks are "acceptable." Pet. 11.[5] In support of this claim, petitioner cites cases involving challenges to agency standard-setting, none of which relates remotely to a district court's power to find environmental injury in a RCRA citizen suit. See *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (evaluating OSHA standards limiting workplace exposures to

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[5] Neither respondents nor the courts below suggest that anything short of a "risk-free" environment would constitute a cognizable injury. *See* Pet. 11. Petitioner repeatedly mischaracterizes the level of risk claimed by respondents and found by the district court to constitute injury. The courts below did *not* determine that "any non-*de minimis* risk of future harm can suffice as a cognizable injury-in-fact." Pet. 10; *see also id.* at 3 (discussing "non-imaginary risks"), 7, 17, 23. The district court cited the "*de minimis*" language in illustrating what plainly does *not* constitute an imminent and substantial endangerment, but did not purport to define by those terms the universe of what *does* represent such an endangerment. Pet. App. 54a. An examination of the district court's full findings and the First Circuit's affirmance confirms that neither court adopted such a watered-down standard. *See infra* Part II.

benzene in light of the purposes of the enabling statute); *Envtl. Def. Fund v. EPA*, 598 F.2d 62 (D.C. Cir. 1978) (discussing deferential standard of review in challenge to EPA regulations governing PCBs). As the First Circuit noted, these cases are inapposite; they do not address standing or Article III's limits on judicial power. Pet. App. 13a & n.6.[6]

Much more to the point are cases involving claims of environmental or health injury where courts have found harm without reference to agency guidelines. Judges routinely and properly assess whether risk of future harm to health or the environment is sufficient for standing, without depending on violations of permit limits or other quantifiable measures of risk established by agencies.

For example, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 73-74 (1978), this Court upheld a finding of injury where plaintiffs feared the effects of future exposures to thermal pollution and radiation from proposed nuclear power plants. Specifically, this Court found that "the emission of non-natural radiation into appellees' environment would also seem a direct and present injury, given our generalized concern about exposure to radiation and the apprehension flowing from the

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[6] Petitioner cites an additional raft of similarly inapposite cases, none of which relates to a court's authority to determine standing under Article III, for the proposition that the First Circuit's finding of injury "compels courts to make judgments for which they lack institutional competence and constitutional authority." Pet. 15 & n.3. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83-89 (1994) (explaining this Court's decision not to graft a federal common-law exception onto a state statute in furtherance of federal policy); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (deferring to EPA's policy choices in upholding air pollution regulations); *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 647 (1981) (rejecting a request to add a federal common-law rule of contribution to antitrust laws); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109-14 (1948) (explaining why a Civil Aeronautics Board order regarding air transportation routes is not subject to judicial review under the Civil Aeronautics Act).

uncertainty about the health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants." *Id.* at 74 (footnote omitted). Notably, the Court credited findings of injury that were not based on violation of agency-defined standards, and were, in fact, less definitive than those of the district court in this case.

Similarly, the Third Circuit, citing *Laidlaw*, found in a RCRA imminent and substantial endangerment case that plaintiffs showed injury through reduced use of a river based on concerns about pollution from a chromium-contaminated waste site, without reference to violation of any agency standard. *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 256-61 (3d Cir. 2005). In that case, the court specifically held that, in light of the text and intent of the provision, a district court may not require "[p]roof of contamination in excess" of agency-delineated standards to establish *liability* under section 6972(a)(1)(B). *Honeywell*, 399 F.3d at 259-61. Since courts may not "raise the standing hurdle higher than the necessary showing for success on the merits in an action," *Laidlaw*, 528 U.S. at 181, plaintiffs need not show violation of agency standards to demonstrate injury.

Even in cases involving EPA standards, courts are not necessarily constrained by those standards in finding risk of harm. In *LaFleur v. Whitman*, 300 F.3d 256, 269-71 (2d Cir. 2002), plaintiff's exposure to defendant's increase in emissions was an injury-in-fact, notwithstanding that in the worst case scenario, defendant's emissions would be "well below the applicable" air quality standard established by EPA under the Clean Air Act: "Actual exposure to increased levels of $SO_2$ at one's workplace is certainly something more than an 'identifiable trifle,' even if the ambient level of air pollution does not exceed the [National Ambient Air Quality Standards]."[7] *Id.* at 271 (citation omitted).

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[7] Although petitioner tries to distinguish cases against the government as affording relaxed requirements for standing, Pet. 11-12, 14, those

While violations of agency standards, as in a case like *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 157 (4th Cir. 2000), might be "presumptively harmful," Pet. 4, respondents neither sought nor received any such presumption in this case. Rather, respondents established injury-in-fact the traditional way, as befits a claim drawn from common-law principles – through an array of scientific evidence drawn from the affected citizens, experts, and government officials.[8]

### 3. Courts Are Competent To Assess Risks.

Petitioner's assault on the district courts' competence to assess risks, *see* Pet. 15, is at odds with centuries of such fact-finding. The First Circuit correctly rejected petitioner's thesis, noting that federal courts have long been called upon to tackle complex, highly technical issues in individual cases, as in the patent field. Pet. App. 27a. In rejecting petitioner's standing

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requirements relate only to redressability and immediacy, *Massachusetts v. EPA*, 127 S. Ct. at 1453, and not to plaintiffs' need to demonstrate a concrete injury-in-fact, *Defenders of Wildlife*, 504 U.S. at 572 n.7.

[8] While petitioner attempts to portray a court run amok, unmoored from agency determinations, the district court, did, in fact, consider evidence from "politically accountable" agencies in finding injury. The court heard extensive testimony from two federal environmental officials (Tr. Vol. 2-A, at 19-85; Tr. Vol. 2-B, at 2-86; Tr. Vol. 2-C, at 3-12; Tr. Vol. 3-A, at 25-85; Tr. Vol. 3-B, at 3-16) and three state environmental officials (Tr. Vol. 3-B, at 17-82; Tr. Vol. 3-C, at 2-53; Tr. Vol. 4-B, at 48-72; Tr. Vol. 4-C, at 3-78; Tr. Vol. 5-A, at 4-38). The court also assessed the potential for harm with reference to mercury "Reference Doses" developed by EPA. Pet. App. 50a. The court further took into account the fact that sediment mercury levels in the Penobscot River exceed guidelines developed by the National Oceanic and Atmospheric Administration indicating potential harm to organisms exposed to those levels. Pet. App. 54a-55a & n.13. In finding plaintiffs' avoidance activities reasonable, the court also noted that plaintiffs' members "relied on multiple sources of information, including the [Maine Department of Environmental Protection], to support their conclusion about the safety of using the River or consuming the fish and shellfish in the River and Bay." Pet. App. 66a (citations omitted).

arguments, the court expressed confidence that Congress has not asked federal courts to exceed their capabilities:

> In our view, courts are capable of assessing probabilistic injuries. Moreover, nuisance principles contribute heavily to the doctrinal template that underbraces statutes like RCRA, . . . and the tasks involved in adjudicating environmental cases are well within the federal courts' accustomed domain. While courts can (and do) benefit from available agency expertise, it is an insupportable leap of logic to maintain that, in the absence of such input, claims of injury are not cognizable at all.

Pet. App. 14a (citation omitted).

Under petitioner's interpretation of the statute, no court could ever find standing in a RCRA citizen suit absent violation of agency standards. This would negate the purposes for authorizing an independent cause of action under section 6972(a)(1)(B) and render the provision superfluous, since every set of facts would also have to support a violation of the traditional citizen suit provision, section 6972(a)(1)(A).

Finally, petitioner implies that the remedy ordered by the district court – a study to determine the precise nature and scope of the endangerment – somehow shows that the court used the wrong legal standard for standing, since, it claims, the study will belatedly make the demonstration that was needed for injury-in-fact. Pet. 2, 3, 7, 16. The First Circuit characterized this argument as an "attempted sleight of hand" that "verges on the specious." Pet. App. 9a. Again, petitioner would require more for standing than is required for liability. As discussed in more detail in Part II *infra*, the standard for liability is whether wastes *may* present an imminent and substantial endangerment, not whether they *do* present such an endangerment, a distinction found to be highly significant by courts interpreting the statute. The district court's

August 10, 2005 order approving the study plan, as well as the district court's conclusions on liability, make it clear that the court is proceeding in phases, with appropriate restraint, toward the most suitable remedy to fulfill the protective purposes of the statute. *See* Pet. App. 37a-38a, 69a.[9] The First Circuit concurred in this evaluation:

> The fact that the court chose a remedy that aspires to furnish a degree of determinacy before fashioning further relief speaks only to the court's cautious use of discretion in selecting remedies; it does not speak to the plaintiffs' standing as of the present time.

Pet. App. 9a.

In short, the courts below showed full respect for the limits of Article III. This case does not approach those limits. Rather, the courts below have effectuated Congress's considered choice to provide judicial redress where the responsible agencies fail to carry out statutory goals:

> Congress has elected to create a cause of action for affected citizens notwithstanding the absence of any EPA-sponsored standard. While we share Mallinckrodt's belief that it would be a usurpation of legislative prerogative for a court to assume policymaking control over environmental regulation, it would be no less offensive a usurpation for a court to refuse to undertake a task validly entrusted to it by Congress. In the last analysis, Article III requires a cognizable

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[9] Petitioner mischaracterizes the study order as ascertaining whether mercury "'*may* present an imminent and substantial endangerment,'" Pet. 2, when the court actually says the study plan "'is designed to determine the extent of contamination downriver . . . and whether such contamination *endangers* human health and the environment,'" Pet. 7 (emphasis added), an important difference, as discussed in Part II, *infra*.

> injury; it does not speak to the wisdom of the legislature's actions in providing redress for that injury.

Pet. App. 13a-14a.

Accordingly, this Court should not grant the petition to review the finding of standing.

## II. THE LANGUAGE AND PURPOSE OF RCRA AND ITS CITIZEN SUIT PROVISION COMPEL THE INTERPRETATION OF THE "IMMINENT AND SUBSTANTIAL ENDANGERMENT" LEGAL STANDARD ADOPTED BY THE FIRST CIRCUIT AND ALL OTHER CIRCUITS THAT HAVE CONSIDERED THAT STANDARD.

The First, Second, Third, Fifth, and Eleventh Circuits have all held unanimously that courts' "imminent and substantial endangerment" authority under RCRA section 7002(a)(1)(B) should be liberally construed. *See* Pet. App. 15a-17a, 31a-32a; *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991) ("Significantly, congress used the word 'may' to preface the standard of liability . . . . This is 'expansive language'. . . ." (citations omitted)), *rev'd in part on other grounds*, 505 U.S. 557 (1992); *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 258-59 (3d Cir. 2005) (agreeing with other courts that the "operative word" is "may," and that "'if an error is to be made in applying the endangerment standard, the error must be made in favor of protecting public health, welfare and the environment.'" (quoting *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 194 (W.D. Mo. 1985))); *Cox v. City of Dallas*, 256 F.3d 281, 299 (5th Cir. 2001) (noting, "[a]t the outset," that "the operative word is 'may'"); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1015 (11th Cir. 2004) (agreeing with other Courts of Appeals that the operative word is "may," that "endangerment" does not require proof of actual harm, and that the provision grants expansive authority

"to eliminate *any risk* posed by toxic wastes" (internal quotations and citations omitted)); *see also Albany Bank & Trust Co. v. Exxon Mobil Corp.*, 310 F.3d 969, 972 (7th Cir. 2002) ("Imminence does not require an existing harm, only an ongoing threat of future harm." (citing *Cox*, 256 F.3d at 299)).

Two other Circuits have upheld a similarly broad interpretation of liability under section 7003, the parallel provision giving EPA imminent and substantial endangerment enforcement authority. *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989) (noting that RCRA is a remedial statute that should be liberally construed and whose purpose is "to 'give broad authority to the courts to grant all relief necessary to ensure complete protection of the public health and the environment.'" (quoting *Conservation Chem.*, 619 F. Supp. at 199)); *United States v. Waste Indus., Inc.*, 734 F.2d 159, 165 (4th Cir. 1984) (rejecting the proposition that "section 7003 was designed to control pollution only in emergency situations"). Congress itself declared that the provision was "'intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any risks* posed by toxic wastes.'" S. Rep. No. 98-284, at 59 (1983) (quoting *United States v. Price*, 688 F.2d 204, 213-14 (3d Cir. 1982)) (emphasis added). No court of appeals has held to the contrary.

Petitioner, however, urges this Court to manufacture a new, more restrictive standard of liability, without basis in the language of the statute, its purpose, or the combined wisdom of all the appellate courts to consider the standard. Petitioner's claims of future interference with the workings of American industry and government are groundless, given the uniform, uneventful application of the statute for more than twenty years. [10]

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[10] It bears noting that even if a court were to adopt the more polluter-friendly legal standard urged by petitioner, that would not prevent the

### A. The Lower Courts' Interpretation Implements Congress's Grant Of Authority To Courts To Protect Public Health And The Environment Where Agencies Fail To Do So.

Petitioner first argues that the conventional "imminent and substantial endangerment" legal standard usurps agency policy-making power. Pet. 17-18. In support of this claim, it cites no authority that goes beyond the "indisputable verity" that "principal responsibility for implementing and enforcing RCRA resides with EPA, not with citizens acting as private attorneys general." Pet. App. 24a. Respondents agree that EPA retains primary responsibility under RCRA to protect human health and the environment. The citizen suit provision, as interpreted by the courts below, is in full accord with Congress's allocation of that responsibility.

In adding citizen suit provisions to all the major statutory schemes that empower government agencies to shape and direct environmental activities, Congress has recognized that those agencies do not always carry out the statutory mandates. Through each of these provisions, Congress has accorded affected citizens purposefully delineated rights to invoke the protection of the federal courts. *See, e.g.*, Clean Water Act § 505, 33 U.S.C. § 1365; Clean Air Act § 304, 42 U.S.C. § 7604.[11]

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purported harm that petitioner fears; courts would still be making judgments about endangerment that do not rely on agency standards. The same analysis applies in the Article III context. Thus, petitioner seems willing to endorse court determinations about harm, as long as they are more favorable to its interests in avoiding liability.

[11] "[T]he purpose behind the citizen suit provision [of the Clean Water Act] was 'to both goad the responsible agencies to more vigorous enforcement of the anti-pollution standards and, if the agencies remained inert, to provide an alternative enforcement mechanism.'" *Student Pub. Interest Research Group of N.J., Inc. v. Fritzsche, Dodge & Olcott, Inc.*, 759 F.2d 1131, 1136 (3d Cir. 1985) (quoting *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 218 (3d Cir. 1979) (discussing Clean Air Act)).

In extending imminent and substantial endangerment authority to citizens in 1984, Congress lamented EPA's lack of enforcement diligence:

> Equally distressing is the inadequate effort by the [EPA] with respect to criminal and civil enforcement actions. Part of this problem is due to insufficient personnel resources as well as some deficiencies in existing law. However, oversight hearings by the Committee also indicate that the Agency has not been diligent in vigorously pursuing a tough enforcement program.

H.R. Rep. No. 98-198, pt. 1, at 20 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 5576, 5579. Congress stated its belief that "this expansion of the citizens suit provision will complement, rather than conflict with, the Administrator's efforts to eliminate threats as to public health and the environment, particularly where the Government is unable to take action because of inadequate resources." *Id.* at 53, 1984 U.S.C.C.A.N. at 5612; *see also* S. Rep. No. 98-284, at 5 (1983) (noting limits on government's ability to address all problem sites).

By definition, every RCRA citizen suit to address potential imminent and substantial endangerment "second-guess[es]" EPA actions or inactions. *See* Pet. 17. As the First Circuit noted, EPA has four ways to preclude a citizen suit by taking steps itself to remedy impending environmental harm. Pet. App. 25a; *see also* RCRA § 7002(b)(2)(B), 42 U.S.C. § 6972(b)(2)(B). But if EPA fails to act as Congress specifies, citizens may call on the courts to intervene upon a finding that wastes may present an imminent and substantial endangerment. A successful citizen suit thus corresponds to a judgment that government has not acted effectively to prevent harm to public health or the environment, as measured by standards set by Congress.

As the First Circuit observed, the particulars of this case illustrate the point that the traditional legal standard does not subvert EPA's primacy in implementing and enforcing RCRA. In this case, EPA failed to require downriver remediation of mercury, and never finalized any so-called "media protection standards." Pet. App. 25a. "Furthermore, EPA has never taken the position – even so much as hinted – that correction of the Plant's effects on downriver pollution is bad policy. Thus, this is not a situation in which a court has presumed to grant relief that flies in the face of an express EPA authorization of certain conduct." *Id.* In this context, the First Circuit noted that the district court was sensitive to separation-of-powers concerns, three times considering and "thoughtfully reject[ing]" primary jurisdiction challenges, while leaving open the possibility that primary jurisdiction concerns could arise in the future. *Id.*

### B. The Interpretation Of RCRA Uniformly Adopted By The Courts Of Appeals Is Most Consistent With Canons Of Statutory Construction.

#### 1. Imminent And Substantial Endangerment Authority Is An Alternative And Supplement To Other RCRA Remedies, Not Part Of An Invented "Hierarchy Of Risks And Remedies."

Petitioner claims that it has discovered a never-before elucidated hierarchy of risks and remedies within RCRA that compels a stricter reading of the "imminent and substantial endangerment" liability standard than any court has adopted. This purported hierarchy is a chimerical construct that the First Circuit correctly declined to credit. *See* Pet. App. 22a-24a.

Petitioner posits that RCRA's provisions describe three distinct risk levels, each of which authorizes a remedy that escalates in rigor as the risk increases. Pet. 18. According to this argument, because imminent and substantial endangerment authority results in "immediate injunctive

relief," liability must be limited to situations where the potential risk is "so grave and likely that it warrants immediate preventive action." *Id.*

Petitioner's argument rests in the first instance on a fundamental mischaracterization of the relief available in an imminent and substantial endangerment case. While the statute gives the district court *authority* to "restrain" a party that has contributed or is contributing to the activities regarding the waste at issue, and to order a party "to take such other action as may be necessary," 42 U.S.C. § 6972(a), a district court has its usual discretion to order a full range of remedies, from a study (as the district court below ordered) through immediate cleanup. A court is by no means required to order remediation, or any other particular form of relief. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." (citations omitted)).[12]

The legislative history confirms the plain import of the provision. At the same time that Congress enacted section 7002(a)(1)(B), it confirmed (in discussing EPA's parallel authority under section 7003) that imminent and substantial endangerment authority provides an independent mechanism for district courts to order discretionary remedies:

> Section 7003 is an *alternative and supplement to other remedies*. Nevertheless, section 7003 provides for the awarding of equitable relief and, as with any equitable remedy, requires the

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[12] Petitioner's arguments are based on the faulty assumption that the availability of immediate injunctive relief must mean the standard for liability is heightened. Petitioner then complains that the district court's ordering of a study, instead of immediate cleanup, somehow demonstrates that liability was wrongly adjudged. *Compare* Pet. 18 *with id.* at 16.

> court to consider all circumstances of the case and to carefully balance all relevant factors.

S. Rep. No. 98-284, at 59 (1983) (citation omitted) (emphasis added). In fact, section 7003 begins with a declaration of its independence from other provisions of RCRA ("Notwithstanding any other provision of this chapter, . . ."). For this reason alone, the hierarchy crumbles.[13]

An examination of the EPA actions that may preclude an "imminent and substantial endangerment" citizen suit further refutes petitioner's theory that liability must be reserved for the most dire situations requiring immediate cleanup. For example, citizens may not bring suit if EPA "has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C. § 9604] and is diligently proceeding with a remedial action under that Act." *See* 42 U.S.C. § 6972(b)(2)(B)(iii). That those activities may bar citizen action shows that Congress considered a study to determine appropriate remediation (well short of "immediate preventive action," Pet. 18) as a suitable response to wastes that may present an imminent and substantial endangerment. The orders of the district court below reflect such a response.

RCRA contains no "graduated scale of risks and responses." Pet. 18. Congress conferred "imminent and substantial endangerment" authority to ensure complete protection against threats from dangerous wastes, irrespective of other remedies provided for in the statute. The provision

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[13] Nor is it even obvious that the levels of risk fall into the neat pattern petitioner conjures up. Why does the phrase "*poses* a substantial potential risk to human health," 42 U.S.C. § 6939a(b)(2) (emphasis added), necessarily denote a lower level of risk than "*may present* an imminent and substantial endangerment to health or the environment," *id.* § 6972(a)(1)(B) (emphasis added)? Congress evinced no intent to rank these provisions, and the First Circuit correctly rejected "the mechanical cross-referencing" proposed by petitioner. Pet. App. 22a.

authorizes district courts to respond with discretionary relief appropriate to the level of risk, and to gather information as needed before the risk can be abated responsibly.

### 2. The First Circuit's Interpretation Preserves The Independent Applicability Of Two Types Of RCRA Citizen Suits.

Petitioner's claim that the First Circuit's interpretation renders the bifurcation of the citizen suit provision superfluous rests on its persistent mischaracterization of the legal standard applied by the court. According to petitioner, the First Circuit upheld a liability standard that amounts to any "non-*de minimis* risks." Pet. 20. That is far from the standard applied by either of the courts below. The district court imposed liability based on evidence that "clearly demonstrated that the Penobscot River is contaminated with mercury through the mouth of the River and into the Bay." Pet. App. 61a (citation omitted).

> Reliable evidence further established that mercury levels are elevated in Penobscot downriver sediments, that mercury is methylating downriver, and that such methylmercury is bioavailable, entering biota, and biomagnifying throughout the food web. As a result, dangerously high levels of mercury may be present in Penobscot fish and other sea food consumed by the public. These elevated body burdens of mercury may also present an imminent and substantial endangerment to the environment.

*Id.* (citations omitted).

The First Circuit held that an imminent and substantial endangerment "requires a reasonable prospect of a near-term threat of *serious* potential harm," finding that the district court made "supportable findings" about mercury toxicity and

methylation "that suffice to bring this case within the compass of that standard." Pet. App. 32a (citations omitted) (emphasis added).

> Based on these and other well-founded findings, the plaintiffs established that *the potential risk from mercury is serious and likely to be present here and now.* In turn, these findings support a conclusion that, as the district court held, there may be an imminent and substantial endangerment to the lower Penobscot River.

*Id.* (emphasis added).

That the courts below relied on explicit findings of serious threats to human health and the environment from persistent mercury contamination refutes petitioner's argument that the legal standard endorsed below would support liability under section 7002(a)(1)(B) for virtually any set of facts also supporting a claim under section 7002(a)(1)(A). A plaintiff need not show a risk of serious harm in a case brought under section 7002(a)(1)(A) for violations of agency mandates, because such violations are presumptively harmful (as petitioner argues elsewhere with respect to standing, Pet. 12). Evidence of violations of RCRA's regulatory requirements can often be proved merely by referencing public monitoring or inspection records. In such a case, plaintiffs may lack independent evidence of potential endangerment to human health or the environment (which generally requires expert testimony, as in the case below).

The two types of suits can also be precluded by different government activities. So, for example, a citizen may maintain a suit under section 7002(a)(1)(A) for violation of a permit, even if EPA has issued an order pursuant to which a polluter is proceeding with a remedial action at a site. *Compare* 42 U.S.C. § 6972(b)(1)(B) (providing that a citizen suit for a permit violation may be precluded only by a

government suit to require compliance with that permit) *with* 42 U.S.C. § 6972(b)(2)(B)(iv) (providing that a citizen suit for imminent and substantial endangerment may be precluded by an EPA-ordered remedial action).

Finally, the two provisions may afford distinct types of relief. Under section 7002(a)(1)(A), a court may enforce the permit, regulation, or other requirement that is being violated, and may assess civil penalties under 42 U.S.C. § 6928(g). Under section 7002(a)(1)(B), a court may order equitable remedies as needed, but courts are divided over whether civil penalties are available. *Compare Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1574 (5th Cir. 1988) (penalties available) *with Commerce Holding Co. v. Buckstone*, 749 F. Supp. 441, 445 (E.D.N.Y. 1990) (penalties not available).

Thus, both citizen suit provisions retain vitality under the First Circuit's interpretation of RCRA.

### 3. The First Circuit's Interpretation Harmonizes RCRA's Uses Of Statutory Terms.

Petitioner scrambles statutory provisions, legislative history, and case law in an attempt to show inconsistencies in the interpretations of section 7002(a)(1)(B) and section 7003. Pet. 21-23. This argument requires deliberate blindness to differences in language and to changes in the "imminent and substantial endangerment" provisions over time, relative to each other and to courts' pronouncements on their meaning. Petitioner's claims falter for at least three reasons.

First, petitioner errs when it argues that the First Circuit's interpretation strips the phrase "imminent and substantial endangerment" of its intended meaning. As discussed above, the courts below found liability based on evidence of serious threats from a highly toxic chemical that currently permeates the Penobscot ecosystem, thus attributing proper significance to the modifiers "imminent" and "substantial." Moreover,

petitioner ignores the operative import of the word "may," which all courts agree must be read to temper the statutory standard. *See* Pet. App. 16a-17a; *Honeywell*, 399 F.3d at 258-59; *Parker*, 386 F.3d at 1015; *Cox*, 256 F.3d at 299; *Dague*, 935 F.2d at 1355; *Waste Indus.*, 734 F.2d at 165. Accordingly, the stated impact of the modifiers "imminent and substantial" on the construction of the phrase "*will* endanger" by the courts in *Ethyl Corp. v. EPA*, 541 F.2d 1, 20 n.36 (D.C. Cir. 1976) (en banc), and *Reserve Mining Co. v. EPA*, 514 F.2d 492, 528 (8th Cir. 1975) (en banc), does not fully inform the statutory standard in the citizen suit at issue here: "*may* present an imminent and substantial endangerment." *Cf.* Pet. 21.

Second, petitioner neglects to reveal that section 7003 was amended before Congress enacted the citizen suit provision modeled after that authority. Even if Congress drew from such cases as *Ethyl Corp.* and *Reserve Mining* in 1976, when adopting the original version of section 7003, it later made a significant amendment. In 1980, Congress changed the language from "*is* presenting . . ." to "*may* present . . . ," a change the First Circuit concluded "fundamentally altered how this provision was understood." Pet. App. 28a; *see* Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334. Again, this is consistent with the prevailing view that "may" is the operative word in the statute.

Legislative history from the 1984 amendments, when section 7002(a)(1)(B) was adopted, is thus much more probative of how section 7003 was understood at the time than 1976 legislative history regarding the earlier, more stringently worded provision. As the First Circuit observed, discussions in both the House of Representatives and the Senate took note of the expansive powers conveyed to the government through section 7003. Pet. App. 28a-29a. Indeed, in discussing the liability standard under section 7003, the Senate Report "enthusiastically" quotes *Price*, 688

F.2d at 214, for the proposition that section 7003 is aimed at eliminating any risks posed by toxic wastes. Pet. App. 29a & n.13; *see also* S. Rep. No. 98-284, at 59 (1983). The 1984 Congress did not misunderstand the liability standard of the 1976 Congress, Pet. 22; it was modeling the new citizen suit provision on a broader liability standard as amended by the 1980 Congress.

Third, petitioner proposes that words in a statute must always have the same meaning, so that the word "endangerment" in the citizen suit provision must mean the same as the word "endangerment" in RCRA's criminal provision, section 3008(e), 42 U.S.C. § 6928(e). Pet. 22. This is doubly misguided. This Court recently rejected such a proposition in its unanimous opinion in *Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423 (2007), interpreting the word "modification" in different provisions of the Clean Air Act:

> [T]he "natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.

*Id.* at 1432 (citation omitted). This is such a situation: The First Circuit noted that there is "no meaningful parallelism" between the civil and criminal provisions petitioner seeks to compare. Pet. App. 22a. The court further observed that if one were to import petitioner's definition of "endangerment" from section 3008(e), where it is claimed to denote "imminent

danger of death or serious bodily injury," the word "imminent" in section 7002(a)(1)(B) "would be rendered utterly redundant – the statute would, in effect, require an imminent imminence – thus transgressing the very canon of construction that [petitioner] labors to invoke." Pet. App. 22a-23a.

In short, it is petitioner's argument, not the First Circuit's interpretation, that does violence to canons of statutory interpretation. The standard of liability in the citizen suit provision is fully consistent with the parallel standard in section 7003, as understood by Congress and interpreted by the courts.

### C. RCRA's Citizen Suit Provision, As Uniformly Interpreted By The Courts Below For Over Twenty Years, Has Protected Public Health And The Environment, Properly Allocated Costs Of Contamination To Polluters, And Complemented Agency Enforcement.

In a last-ditch effort to capture this Court's attention, petitioner presents a dramatic picture of American industry on its knees, and the thwarting of both congressional and agency will, as a result of the First Circuit's ruling. Petitioner fails to explain why this decision will be the one to spark this chaos, when courts have been interpreting RCRA consistently for the past twenty years. The standard applied by the First Circuit has been uniformly followed by appellate courts at least since the Second Circuit decided *Dague* in 1991, yet there has not been a resulting proliferation of RCRA citizen suits.[14] In fact, a recent study reported that, between 1995 and 2000, only seventeen citizen suits were brought under RCRA,

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[14] Even before *Dague*, district courts were adopting the broad standard since endorsed by the appellate courts. *See, e.g., Middlesex County Bd. of Chosen Freeholders v. N.J. Dep't of Envtl. Prot.*, 645 F. Supp. 715, 721-22 (D.N.J. 1986) (quoting legislative history and *Price*, 688 F.2d at 213, in support of an expansive reading of the citizen suit provision).

compared to 252 citizen suits brought under the Clean Water Act in the same time period. Kristi M. Smith, *Who's Suing Whom?: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought Under EPA-Administered Statutes, 1995-2000*, 29 Colum. J. Envtl. L. 359, 386 (2004).[15] These data reveal that the standard applied by the lower courts has not had the "significant and far-reaching affects [sic]" on industry suggested by petitioner. Pet. 25.

Petitioner bemoans the burdens on industry attempting to plan for the costs of RCRA citizen enforcement, worrying that "[t]he high risk of litigation in this broad class of cases alters the manner in which businesses evaluate the cost of industrial development . . . ." Pet. 23. In light of the small number of RCRA citizen suits, this concern is overblown. But petitioner also misses the point that environmental regulation and enforcement are *intended* to apportion costs of pollution to those who profit from the polluting activities. RCRA, like other environmental laws, compels businesses to internalize the costs of their actions. Without such regulation, industry will pass on the environmental costs of production to society in order to maximize its profits. Zygmunt J.B. Plater, *Dealing With Dumb and Dumber: The Continuing Mission of Citizen Environmentalism*, 20 J. Envtl. L. & Litig. 9, 18 (2005). These costs, however, do not disappear without regulation; they are borne by innocent citizens rather than the industry that created them. *Id.* at 23. Citizen suits under RCRA and other environmental laws help ensure that the full costs of production are assumed by profiting industries. *See id.* at 25-27.

Petitioner also raises the specter of unconstrained, "irrational" citizen enforcement. Pet. 24. Again, petitioner

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[15] Because the study aggregated suits brought under both citizen suit provisions of RCRA, it is likely that the number of "imminent and substantial endangerment" suits was even lower than seventeen.

cannot point to a proliferation of such enforcement in the years since the liability standard applied by the First Circuit below was first articulated by the Second Circuit. This may be in part because it is not an easy matter to maintain an action for potential imminent and substantial endangerment. The record in this case represents years of work, including substantial contributions by paid experts, prior to any finding of liability. There are other deterrents to bringing unwarranted claims. For example, if a court finds that a plaintiff's suit is "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so," courts can award attorney's fees to defendants. *See Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 422 (1978); *Razore v. Tulalip Tribes of Wash.*, 66 F.3d 236, 240 (9th Cir. 1995) (finding that the *Christiansburg* standard applies in RCRA and Clean Water Act citizen suits).

Finally, petitioner argues once more that citizen suits may encroach on proper agency enforcement. As discussed in more detail above, Congress recognized gaps in government enforcement, and purposefully empowered federal courts to consider citizen complaints.[16] Congress endorsed an expansive reading of "imminent and substantial endangerment" authority, with a primary intent "to protect public health and the environment." S. Rep. No. 98-284, at 59 (1983); *see also* Pet. App. 28a-29a. In granting district courts broad discretion to remedy threats from toxic wastes, Congress considered the effects on agency enforcement, and concluded that the results would be beneficial. H.R. Rep. No. 98-198, pt. 1, at 53 (1983), *as reprinted in* 1984

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[16] Citizen suits are important to counter agency "capture," which occurs when regulating agencies succumb to political or other pressures and make regulatory choices that benefit industry at the expense of public health and the environment. *See* Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 Stan. Envtl. L.J. 81, 108, 126-27, 146-47 (2002).

U.S.C.C.A.N. 5576, 5612; *see also* S. Rep. No. 98-284, at 5 (1983). While petitioner might prefer a more limited role for citizens and federal courts, Congress has chosen otherwise.

Far from being a pressing question of federal law, the long-standing interpretation of RCRA's "imminent and substantial endangerment" citizen suit provision, properly applied by the courts below to a threat of serious harm that was left unaddressed by government agencies, has engendered no debate in the courts, no proliferation of lawsuits, and no amendment by Congress since it was adopted in 1984. The Court should deny the petition.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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